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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Newspaper/Radio Cross-Ownership Waiver Policy	)	MM Docket No. 96-197

COMMENTS OF THE OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST, NATIONAL ORGANIZATION FOR WOMEN AND MEDIA ALLIANCE

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SUMMARY

The Office of Communication, Inc. of the United Church of Christ, National Organization for Women and Media Alliance ("UCC, *et al.*"), strongly oppose the repeal or substantial modification of the Newspaper/Broadcast Cross-Ownership Rule. Permitting common ownership of a daily newspaper and broadcast station serving the same communities would unacceptably reduce the public's access to diverse sources news and views about public issues that is essential to a democratic society, stifle competition in advertising, and further curtail the already limited opportunities for new entrants, including minorities and women.

In 1975, the Commission promulgated the Newspaper/Broadcast Cross-Ownership Rule with the goal of insuring continued viewpoint diversity and competition in local media markets. While the number of distribution outlets, included cable television and the Internet, have increased over the past twenty-five years, studies continue to indicate that the vast majority of consumers still receive local news and public affairs information from broadcast stations and the daily newspaper located in their community.

In order to test the level of diversity and competition in local media markets, UCC, *et al.* conducted a study of broadcast ownership and competition in ten local media markets from 1993 to 2001. UCC, *et al.*'s study indicates that during this period, the number of independent radio station owners decreased in nine out of ten markets studied, even though the actual number of radio stations increased in those markets. In addition, the number of independent television station owners also declined in markets that were affected by the Commission's new Duopoly Rule. Allowing a local daily newspaper, which is a monopoly in almost all media markets, to join with a broadcast station group or even a single broadcast station owner will further reduce

the already limited diversity in local markets.

The danger of newspaper/broadcast combinations can also be seen through traditional antitrust analysis. In UCC, *et al.*'s ten market analysis, none of the radio or television markets had an HHI below 1000, indicating unconcentrated markets. On the contrary, seven of the ten television markets studied and eight of the ten radio station markets had HHIs above 1800, indicating that they are highly concentrated. Such concentration indicates a serious competitive problem in these markets that can only be exacerbated by the addition of a local daily newspaper to any of the broadcast station combinations.

Many of these anti-competitive harms are illustrated in the few media markets where newspaper/broadcast combinations currently exist. In many of those markets, newsroom and reporting assets are consolidated between the daily newspaper and broadcast station, resulting in the loss of adversarial reporting. In addition, there are numerous reports of newspaper/broadcast combinations offering "tied" packages of newspaper and broadcast adverting at prices that potentially may be below the cost of providing the advertising . All of these actions only serve to harm diversity and competition in the affected local markets.

"New" media sources, such as regional cable news networks and the Internet, do not provide independent sources of diversity. Of the thirty regional cable news networks identified by UCC, *et al.*, twenty were owned by the daily newspaper or a broadcast station in the local market. Furthermore, most studies indicate that the Internet is generally used as a source for national and international news. To the extent that it provides local news, the most frequently viewed sites are generally those controlled by existing local daily newspaper and broadcast stations.

Finally, it is important to note that the Newspaper/Broadcast Cross-Ownership Rule was upheld by the Supreme Court in 1978. Since then, the Court has had numerous opportunities to review the rationale underlying that decision, and has left it undisturbed. The D.C. Circuit's decision in *Time Warner* addressed cable ownership regulation, and applied a standard of scrutiny that is not applicable to broadcast regulation. Accordingly, the D.C. Circuit's decision in Time Warner does not affect the constitutional underpinnings of the Newspaper/Broadcast Cross-Ownership Rule.

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COMMENTS OF THE OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST, NATIONAL ORGANIZATION FOR WOMEN AND MEDIA ALLIANCE

The Office of Communication, Inc. of the United Church of Christ, National Organization for Women and Media Alliance ("UCC, *et al.*")[1], through undersigned counsel, hereby submit the following comments pursuant to the Commission's Notice of Proposed Rule Making [2] requesting comments regarding possible modification of the Commission's rule barring common ownership of a broadcast station and daily newspaper in the same market ("Newspaper/Broadcast Cross-Ownership Rule").[3]

UCC, *et al.* oppose the repeal or modification of the Newspaper/Broadcast Cross-Ownership Rule. As further delineated below, many local television and radio markets have become extremely concentrated over the last eight years. Permitting common ownership of a

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[1]*See* Attachment 1 for descriptions of the organizations and their constituencies.

[2]*See* Cross-Ownership of Broadcast Stations and Newspapers, Order and Notice of Proposed Rule Making, MM Docket No. 01-235 (rel. Sept. 20, 2001) (hereinafter "Notice").

[3]*See* 47 C.F.R. §73.3555(d).

daily newspaper and broadcast station in local markets would only further reduce diversity and competition in those markets, and curtail already limited opportunities for new entrants, including minorities and women. The "new media" distribution sources that have appeared since the implementation of the Newspaper/Broadcast Cross-Ownership Rule do not obviate the need for newspaper/broadcast station ownership restrictions because the "new media" sources are often controlled by the same owners of the local broadcast entities or the local newspapers, and do not provide a new outlet for additional diversity or competition. Furthermore, the recent decision of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in *Time Warner Entertainment Co. v. FCC* does not alter the Supreme Court's finding that the Newspaper/Broadcast Cross-Ownership Rule is constitutional. Accordingly, UCC urges the Commission to retain the Newspaper/Broadcast Cross-Ownership Rule.

I. Local Media Market Conditions Demonstrate the Continued Need for the Newspaper/Broadcast Cross-Ownership Rule

In the Notice, the Commission requested comment on how "changes in the local media marketplace" have affected diversity and competition in those markets.[4] As detailed below, recent changes in radio and television ownership rules have resulted in diminished diversity and competition in many local media markets. Allowing the cross-ownership of local daily newspapers and broadcast station cross-ownerships would only further undermine the public interest in diverse viewpoints and competition.

A. Local Broadcast Media Has Become Increasingly Less Diverse and Concentrated in the Hands of Fewer Owners in the Last Eight Years

In response to the Commission's request for concrete information regarding diversity and

[4]Notice at 5, ¶8.

competition in local television and radio markets, UCC conducted a study of ten U.S. media markets to determine the effects of consolidation from 1993 to 2001.[5] The 1993 start date for the study was chosen to obtain information for a "baseline" year prior to the enactment of the Telecommunications Act of 1996 ("1996 Act") and subsequent changes in broadcast ownership rules. The 2001 end date represents the most current data available to UCC.

The markets examined in the study comprised three very large and large markets, four medium-sized markets, and three small markets.[6] In all the markets, UCC, *et al.* looked at the number of independent owners in 1993, and compared that to the number of independent owners in 2001 to measure the level of ownership diversity in a particular area. In addition, UCC, *et al.* also looked at the local commercial share of the top four owners in 1993 and 2001 to determine the level of competition in a particular metropolitan area. UCC, *et al.* has found that both ownership diversity and competition declined substantially in almost all the markets studied.

1. Ownership Consolidation in Local Radio Markets

The Notice states that "at approximately the same time that the 1996 Act became law there were approximately 5,100 owners of commercial radio stations," and notes that "now there

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[5]*See* Attachment 2, UCC, et al. Local Radio Ownership and Market Concentration Study (hereinafter "Radio Study"), at 1 and Attachment 3, UCC, et al. Local Television Ownership and Market Concentration Study (hereinafter "TV Study"), at 1 for a detailed description of the methodology involved in preparing the studies.

[6]The markets studied were grouped according to the respective Nielsen DMA Rank for television and the Arbitron Radio Metro Market rank for radio. Accordingly, the three very large to large markets studied were New York City (Nielsen 1)(Arbitron 1), Los Angeles (2)(2), and Charlotte/Gastonia/Rock Hill (28)(37). The medium sized markets studied were Birmingham (39)(57), Lexington/Fayette, KY (66)(106), Tyler-Longview (108)(143) and Portland, ME (79)(164). The three small markets included Fargo (120)(216), Billings, MT (169)(255) and Rapid City, SD (175)(268).

are only approximately 3,800 owners, a decrease of 25%."[7] While these statistics show substantial consolidation even at the national level, it is the number of broadcast station owners at the local level that has the most direct impact on diverse viewpoints available to the public. When one examines independent ownership levels in local radio and television markets, the effects of consolidation have been much more severe.

In the New York City Arbitron Metro Market, there were 57 commercial radio stations with 42 independent owners in 1993.[8] In 2001, the number of commercial radio stations had increased to 75, but the number of independent owners actually decreased to 36.[9] In the Los Angeles Arbitron Metro Market, the situation is even worse. In 1993, there were 62 commercial radio stations in Los Angeles with 42 independent owners.[10] By 2001, the number of commercial radio stations had increased to 69, but the number of independent owners plummeted to 27.[11]

When actual radio station listeners are factored in, however, the true diversity and competitive situation is actually far worse. In New York, the top two radio station owners, Capital Cities/ABC and CBS accounted for 9.1% and 8.9% of commercial listeners in 1993.[12] By 2001, the top two owners, Clear Channel and Infinity, respectively, controlled 24.2% and

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[7]Notice at 7, ¶13.

[8]*See* Attachment 2, Radio Study, at 4.

[9]*See id.*

[10]*See id.* at 7.

[11]*See id.*

[12]*See id.* at 4.

21.2% of the market.[13] The situation is much the same in Los Angeles. In 1993, the two largest stations owners, Cox and Infinity, had 10.5% and 8.8% of commercial listeners in the market.[14] By 2001, the commercial share had ballooned to 23.7% for Clear Channel, the largest owner, and 21.6% for Infinity.[15] In effect, these statistics show that in the nation's two largest cities, the top two radio owner groups control almost fifty percent of the local commercial radio audience.

In most small markets, the radio market is even less diverse and more concentrated. In the Fargo Arbitron Metro Market, there were 8 independent owners of 12 radio stations in 1993.[16] By 2001, the number of independent owners had dropped to 4, a reduction of fifty percent, even though the number of commercial radio stations increased to 13.[17] Furthermore, even though four commercial owners remained in Fargo in 2001, the top two radio station owners, Clear Channel and Triad Broadcasting, controlled a whopping 91% of the local commercial listeners, allowing for little, if any, other competition in that market.[18]

The situation in the Portland Arbitron Metro Market is similar. In 1993, Portland had 24 stations with 15 independent owners.[19] By 2001, the number of independent owners had dropped

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[13] *See id.*

[14] *See id.* at 7.

[15] *See id.*

[16] *See id.* at 18.

[17] *See id.*

[18] *See id.* at 19.

[19] *See id.* at 17.

to only 6, even though the actual number of stations increased to 25.[20] By 2001, the top two radio station owners in Portland, Saga Communications and Citadel, controlled over 75% of the local commercial radio audience.[21]

Overall, the study showed that the number of independent owners decreased or remained the same in nine out of ten cities studied by UCC, *et al.*, even while the number of stations increased, in some cases substantially, in every city. In addition, the share of local commercial listeners held by the top two commercial radio station owners increased in every city studied.

2. Ownership Consolidation in Local Television Markets

The Notice notes that the number of independent television owners nationwide has dropped from 543 in 1995 to only 360 in March 2001.[22] This drop in independent ownership of television stations is also reflected in the UCC, *et al.* study of large television markets. In the New York DMA, for example, there were 23 television stations owned by 21 independent owners in 1993.[23] By 2001, there were still 23 television stations, but they were operated by only 18 owners.[24] In Los Angeles, television station ownership became even more consolidated. In 1993, there were 26 independent owners of 26 full-power television stations.[25] By 2001, there

[20] *See id.*

[21] *See id.*

[22] Notice at 7, ¶13.

[23] *See* Attachment 3, TV Study, at 2.

[24] *See id.*

[25] *See id.* at 5.

were only 20 owners of 25 full-power television stations.[26] In the Charlotte DMA, the situation was much the same. In 1993, the 12 television stations in the DMA had 11 independent owners.[27] By 2001, there were only 9 independent owners of the 12 television stations.[28] In both New York and Los Angeles, the top two station owners controlled over 40% of local commercial television viewers in 2001.[29] In Charlotte, the top two television station groups controlled almost 50% of local commercial television viewers.

Much of the decline in ownership diversity in very large to large markets can be directly traced to the Commission's changes to the local television ownership rules in 1999 that allowed one owner to control two television stations in markets with over eight full-power television stations. As demonstrated by the ownership situation in the cities listed above, this rule change has resulted in substantial television stations ownership consolidation in all three of the very large to large cities studied.

On the other hand, in many medium and small television markets that have not been affected by the changes to the Duopoly Rule because there are fewer than eight independent television voices, the UCC, *et al.* study indicates that ownership diversity has actually stabilized and is, in some cases, increasing. In the Portland, Maine DMA, for instance, the number of television stations increased from 7 to 8 from 1993 to 2001, while the number of independent

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[26] *See id.*

[27] *See id.* at 6.

[28] *See id.*

[29] *See id.* at 3, 5.

owners increased from 5 to 7.[30] Similarly, in the Billings DMA, the number of television stations remained stable at 5 from 1993 to 2001, but the number of independent owners increased from 4 to 5.[31] In both markets, the share of local commercial viewers held by the top two television station groups dropped as well.

Both of these statistics stand in stark contrast to the drastic reductions in ownership diversity in both the Portland and Billings radio markets. The differences between the radio and television markets in those communities suggest that prophylactic ownership limits, such as the application of the "eight-voices test" can help preserve the small amount of existing diversity and competition in medium and small television markets.

B. Allowing Newspaper/Broadcast Cross-Ownership Would Raise Serious Diversity and Antitrust Concerns

While recent changes in the radio and television ownership rules have resulted in decreased diversity and competition, the Newspaper/Broadcast Cross-Ownership Rule has been successful in achieving its intended purpose of promoting diversity and competition. When the FCC began the rulemaking proceeding leading to the adoption of the Newspaper/Broadcast Cross-Ownership Rule in 1969, 94 television stations were affiliated with local newspapers.[32] Today, there are only about 23 combination involving a newspaper and a television station.[33]

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[30] *See id.* at 9.

[31] *See id.* at 12.

[32] *See* Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Further Notice of Proposed Rulemaking, 22 FCC 2d 339, 345, ¶ 31 (1970).

[33] *See* Attachment 4, Current Newspaper/Television Cross-Ownership Chart.

Thus, over seventy new voices have resulted from the operation of the rule. Although the rule required divestiture of some combinations, the majority were over a number of years sold to different buyers as the rule intended.[34] In addition, the existence of the rule prevented untold numbers of new combinations that otherwise could have been created by either initial applications or acquisitions. Repeal or substantial modification of the rule would undoubtedly lead to a large number of acquisitions, thus undermining the very diversity and competition that the rule was intended to and in fact achieved over a long period of time.

1. Allowing Newspaper/Broadcast Combination Will Further Diminish Diversity in Many Local Markets

In the 1975 Order promulgating the Daily Newspaper/Broadcast Cross-Ownership Rule, the Commission notes a Roper study finding that the public generally relies "on newspapers and television stations for their news."[35] Since then, this reliance on daily newspapers and broadcast news has changed little. In fact, the Commission's Notice cites a 1998 study conducted by the Radio Television News Directors Association ("RTNDA") as showing that "41% of Americans cited television as their primary source of local news, 17% cited newspapers, and 11% cited radio stations."[36]

These figures show that most Americans still rely primarily on traditional over-the-air

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[34]Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 FCC 2d 1046, 1080 (1975) (hereinafter "*Second Report and Order*") (limiting divestiture to most egregious cases).

[35]*See id.* at 1057.

[36]Notice at 8, n. 49 (*citing* Radio Television News Directors Association, Americans Rely on Local Television News, Rate It Highly and Consider It Fair, available at www.rtnda.org/issues/survey.htm#download.).

broadcast stations and their local newspaper for information regarding local news.[37] Furthermore, in terms of actually defining the level of source diversity in a local market, these figures highlight the need for the Commission to look at the commercial share a broadcast station owner controls in a specific local market, rather than merely focusing on the number of stations that exist within a local market in order to determine the true harm that could occur if daily newspaper/broadcast common ownership were allowed under the Commission's rules.

In a small market, like Rapid City, where two radio station groups control approximately 75% of the local radio market and two television station groups control approximately 70% of local commercial television viewers, broadcast media control has become much more heavily concentrated in recent years, contributing to a lack of actual "source diversity." Furthermore, Rapid City only has one daily newspaper, the *Rapid City Journal*. Accordingly, a cross-media ownership combination involving the daily local newspaper and any of the four largest broadcast station owners would be especially dangerous because it would allow one entity to dominate local news and public affairs reporting within the market.

Even in the larger cities, such as Charlotte, the danger to source diversity would be high if a broadcast station/daily newspaper merger were allowed. In that city, the two largest radio station owners control approximately 75% of commercial radio listeners, while the top two television station owners control 57% of local television viewers. If any of those owners were allowed to combine with Charlotte's only daily newspaper, *The Charlotte Observer*, it would result in a substantial decrease in the level of source diversity available in that market.

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[37] *See also infra* at Part III. (discussing how "new media" does not provide independent source diversity for local news and public affairs information).

2. Cross-Media Consolidation Will Harm Advertisers in Local Markets

In addition to ensuring a diversity of voices in local markets, the other traditional goal of the Commission's broadcast ownership rules has been to preserve competition in local advertising.[38] This goal was also embodied by Congress in section 202(h) of the Telecommunications Act of 1996 ("1996 Act"), which directs the Commission to conduct biennial reviews to determine whether ownership rules, such as the Newspaper/Broadcast Cross-Ownership Rule, are "necessary in the public interest as a result of competition."

Insufficient competition in the local advertising market harms the public interest in several ways. First, consumers have to pay more for products, since advertisers who have to pay more to advertise will pass on those costs to their customers. Second, the quantity and diversity of information on important public issues is decreased. Political candidates, opponents and proponents of ballot issues, advocacy groups, trade associations, and corporations often have to buy time to get their message out to the public. Without sufficient competition in the advertising market, some of these would-be speakers will be priced out of the market. Moreover, where there are only a few companies that sell advertising time, it is more likely that some would-be advertisers will be rejected because of their point of view, and will not be able to find a comparable, alternative outlet. In either case, the public is less informed and less able to make informed decisions needed in a democratic society.

One of the most widely utilized measures of determining levels of concentration in a

[38]*See Second Report and Order*, 50 FCC 2d at 1059 (noting Department of Justice concerns that excessive ownership concentrations curtailed options open to advertisers).

specific product market is the Herfindahl-Hirschman Index ("HHI").[39] Under the Department of Justice's Merger guidelines, markets with an HHI below 1000 are presumed to be unconcentrated; those with an HHI between 1000 and 1800 are moderately concentrated; and those with an HHI above 1800 are generally deemed highly concentrated.[40] In order to determine the concentration of the ten markets studied, UCC, *et al.* took the average commercial market share provided by BIA for 1993 and 2000, and calculated the HHI for both the radio and television market in each market.

Based on UCC, *et al.*'s calculations, none of the radio or television markets studied in any of the ten cities had an HHI below 1000.[41] Seven of the television markets studied and eight of the radio markets studied had an HHI over 1800, indicating that they are already highly concentrated.[42] Based on the HHI of the studied markets, there would appear to be a general lack of broadcast advertising competition in almost all of the markets sampled by UCC, *et al.*

In the Notice, the Commission noted the debate over whether print and broadcast advertising can serve as a substitute for one another.[43] In a number of areas, such as classified advertising, broadcast advertising does not provide a substitute for print advertising. In certain

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[39]*See, e.g., Federal Trade Comm'n v. Cardinal Health Care, Inc.*, 12 F. Supp.2d 34, 53 (D.D.C. 1998) (noting that the courts come to accpet the HHI as the most prominent and accurate method of determining market concentration).

[40]*See* United States Department of Justice/Federal Trade Commission Horizontal Merger Guidelines, at §1.5.

[41]*See* Attachment 5, HHI Chart.

[42]*See id.*

[43]*See* Notice at 11, ¶21.

other areas, however, these media may provide some competition in the local advertising market. In the retailing area, for example, many advertisers place advertising in print and broadcast media. Car dealers, for example, may place advertisements in a newspaper listing special prices for specific cars, while also placing advertisements on radio and television describing those same automobiles. In this area, print and broadcast advertising provide some form of direct local advertising competition. Thus, to the extent that the Newspaper/Broadcast Cross-Ownership Rule prohibits consolidation between owners of broadcast stations and daily newspapers, it preserves competition between these two advertising media.

Due to the lack of commercially available data delineating the actual share of advertising controlled by print, broadcast and other media outlets in the ten cities studied, it is impossible for UCC, *et al.* to determine an HHI indicating the level of competition in the ten markets if television stations and the daily newspaper, or all media sources, were included as part of a larger "advertising market." However, based on the highly concentrated nature of the radio and television markets in almost all cities studied, UCC, *et al.* believe that if a daily newspaper were commonly owned along with broadcast stations in any of the markets surveyed, the level of concentration in the local market would increase substantially. This in turn would likely reduce competing outlets and increase advertising rates in those markets. Accordingly, UCC, *et al.* believe that any revision to the Newspaper/Broadcast Cross-Ownership Rule should be rejected due to the likely anti-competitive effects that would occur in the advertising market as a result of such change.

II. Existing Newspaper/Broadcast Combinations Harm Diversity and Competition in Their Local Markets

The Notice also requests comment on the putative benefits of newspaper/broadcast combinations to advertisers and the public.[44] Specifically, the Notice requests comment on "the nature and scope of efficiencies combinations might realize, and the nature and magnitude of benefits that flow through to advertisers and ultimately to consumers."[45]

UCC, *et al.*'s ten market survey and other research suggest that existing newspaper/broadcast combinations do not create "efficiencies" or "synergies" that are beneficial to either consumers or advertisers. On the contrary, UCC, *et al.* have found that such combinations are harmful to both source diversity and competition in markets where they exist. With regard to source diversity, UCC, *et al.*'s research suggests that many existing combinations combine resources to achieve cost-savings or to engage in "cross-marketing," rather than to provide expanded news and public affairs programming. For example, in New York and Los Angeles, Tribune has installed cameras in the newsrooms of *Newsday* and the *Los Angeles Times* in order to allow newspaper reporters to provide commentary on co-owned television stations in those cities during news programs.[46] This type of arrangement is also occurring in Milwaukee, where Journal Communications has set up a television camera for WTMJ-TV in the newsroom

[44]Notice at 12, ¶ 25.

[45]*Id.*

[46]*Times for Synergy*, BROADCASTING & CABLE, Oct. 1, 2001 at 20 (noting that Tribune also has a camera for WGN-TV in the Chicago Tribune newsroom).

of its co-owned daily newspaper, the *Milwaukee Journal Sentinel*.[47] In addition, the two entities also share certain stories and conduct joint polling for political events. These arrangements do absolutely nothing to promote source diversity. In fact, such arrangements appear mainly to serve as cost-reduction measures, by eliminating television station employees that would have provided original commentary and analysis.

Combined ownership and operations can also reduce competition, and create an anti-competitive situation in a local advertising market. UCC, *et al.* have attached a signed statement from Jim Helenthal, Publisher of the *Tri-State Shopper*, a free weekly newspaper, alleging specific instances of anti-competitive behavior in the Quincy, Illinois media market.[48] In the Quincy market, the *Tri-State Shopper* competes for advertising against Quincy Newspapers, Inc., which owns the major daily newspaper in the market, the *Quincy Herald Whig*, along with the only commercial television station licensed to the market, WGEM-TV, and two radio stations, WGEM-AM and WGEM-FM.[49] Mr. Helenthal states that in three separate instances, Quincy Newspapers, Inc. used its market position to persuade local companies to remove their advertising from the *Tri-State Shopper*, and advertise exclusively with media entities owned by Quincy Newspapers, Inc.[50] In one specific instance, Mr. Helenthal notes that an advertiser

[47]Eileen Davis Hudson, *Milwaukee*, MEDIAWEEK, Jan. 22, 2001, at 20 (noting that the "Journal Sentinel recently begun working with Journal Communications sibling WTMJ-TV").

[48]*See* Attachment 6, Statement of Jim Helenthal, Publisher of the (Quincy, IL) *Tri-State Shopper*.

[49]*See* 2001 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK (81st ed.) At I-127.

[50]*See* Attachment 6, Statement of Jim Helenthal, Publisher of the (Quincy, IL) *Tri-State Shopper*, at 1-2.

removed its advertising from the *Tri-State Shopper* after receiving a "an offer to run advertising at a special combination rate using both their print and broadcast media."[51]

UCC, *et al.* have also attached signed statements from publishers of community-owned weekly newspaper publishers in Columbus, Ohio;[52] Stuart Florida;[53] and Milford, Indiana[54] detailing the anti-competitive efforts of commonly-owned newspaper/broadcast combinations in those communities. In all three markets, these publishers note the difficulty of attracting and maintaining advertisers where one media entity dominates the market.[55]

Nor are the anti-competitive effects of newspaper/broadcast cross-ownerships limited to smaller markets. In Chicago, the Tribune Company owns the *Chicago Tribune* and WGN-TV. Through its combined ownership of these media entities, Tribune offers "package deals" to

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[51]*See id.* at 2.

[52]See Attachment 7, Statement of Phillip Dauble, Publisher of the Columbus (OH) Messenger. In the Columbus, Ohio media market, the Columbus Messenger competes with the commonly-owned Columbus Dispatch, WBNS-TV and WBNS-AM/FM. *See* 2001 EDITOR & PUBLISHER INTERNATIONAL YEAR BOOK (81st ed.), at I-332; *Investing in Television 2001*, BIA Financial Network, Inc. (3rd ed. 2001); *Investing in Radio 2001*, BIA Financial Network, Inc. (3rd ed. 2001).

[53]*See* Attachment 8, Statement of Gary Hawken, Publisher of the (Stuart, FL) *Flashes Shopping Guide*. In the Stuart-West Palm Beach, FL media market, the *Flashes Shopping Guide* competes with the Scripps Howard-owned *Stuart News* and top-ranked television station in the market, WPTV-TV. *See* 2001 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK (81st ed.), at I-90; *Investing in Television 2001*, BIA Financial Network, Inc. (3rd ed. 2001).

[54]*See* Attachment 9, Statement of Ron Baumgartner, Publisher of *The* (Milford, IN) *Paper*. In the Milford, IN market, The Paper competes with Truth Publishing Co., which owns the *Elkhart Truth* and WTRC-AM/FM. *See* 2001 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK (81st ed.), at I-136.

[55]*See, e.g.* Attachment 7, Statement of Phillip Dauble, Publisher of the Columbus (OH) Messenger (stating that the Columbus Messenger is "usually excluded from any automobile advertising in this market").

advertisers where they can sponsor WGN-TV's chief meteorologist on both television and in his dedicated weather page that appears daily in the *Chicago Tribune*.[56] Such an arrangement grants Tribune an advantage over other broadcasters or the *Chicago Sun-Times* (Chicago's other major daily newspaper) because other outlets cannot offer such a "tying" relationship.[57] Since daily newspapers are a monopoly in most cities, any relaxation or repeal of the Newspaper/Broadcast Cross Ownership Rule would lead to similar tying arrangements in other cities as well.[58]

III. "New Media" Sources Do Not Serve as Effective News or Advertising Substitutes to Broadcast Stations or Daily Newspapers

The Notice also requests comment regarding whether "new media," such as the Internet and cable television, should be considered substitutes to traditional media sources, such as broadcasting and local newspapers, for purposes of diversity and competition.[59] UCC, *et al.* believe that most truly "local" sources of new media do not provide additional source diversity or advertising competition because most local new media outlets are owned by local newspapers or broadcast stations, and merely replicate content that is already available through those sources.

In the Notice, the Commission mentions the influence of cable news programming, and specifically notes the existence of "thirty regional cable news networks" that provide local news

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[56] *See* Eileen D. Hudson, *Market Profile: Chicago*, MEDIAWEEK, June 4, 2001, at 20.

[57] *See id.* (noting that Tribune "aggressively cross-promotes its various media properties in Chicago" and that it claims to reach over 75 percent of adults in Chicago every week).

[58] *See* 2001 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK (81st ed.) at xix (listing only 20 U.S. cities with two or more daily newspapers that are separately owned and not operating pursuant to joint operating agreements).

[59] *See* Notice at 8, ¶15.

in certain metropolitan areas.[60] The vast majority of these regional cable news channels, however, are owned or co-owned by local broadcasters.[61] This ownership pattern is mainly due to the fact that many local broadcasters negotiated carriage of these channels as a component of cable retransmission consent packages.[62] Most of these regional cable news channels do not provide new source diversity in local news. Instead, they merely re-broadcast programming that is already shown on other local broadcast stations, or printed in the local daily newspaper.[63] Accordingly, regional cable news channels should not be regarded as a source of new local news diversity, or as a source of additional advertising competition in local media markets.

The same can generally be said for Internet news sites. Statistics show that most Internet users primarily view national and international Internet news sites, and generally do not view

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[60]Notice at 8, ¶15.

[61]*See* Attachment 10, Regional Cable News Channel Ownership. Of the regional cable news channels identified by UCC, *et al.*, 20 out of 30 were either owned or co-owned by a local broadcaster or a local daily newspaper. Of the remaining 10, 4 were wholly owned by Cablevision and 3 were owned by Time Warner. *See* Deborah McAdams, *Cable News Nets Go Small*, BROADCASTING & CABLE, Sept. 27, 1999, at 42; *see also Belo, Cox Start Mas! News Channel in Ariz.*, BROADCASTING & CABLE, Oct. 2, 2000, at 13.

[62]*See* Steve McClellan, *Texas Two-Step*, BROADCASTING & CABLE, Oct. 2, 2000 (noting that A.H. Belo received carriage for its new Texas Cable News Network on Time Warner cable systems throughout the State of Texas in exchange for retransmission consent licenses for Time Warner to carry Belo's four Texas broadcast stations).

[63]*See id.* (stating that the Texas Cable News Network will "work in conjunction with Belo's stations in the markets" and that "[b]oth stations will provide newsgathering resources for the cable news channels"); *see also* Deborah McAdams, *Cable News Nets Go Small*, BROADCASTING & CABLE, Sept. 27, 1999, at 42 (noting that San Diego's News Channel 15 provides "24-hour local news, weather, and sports reply of KGTV")..

smaller local Internet news sites.[64] Much of this is due to the fact that many of the major national Internet news sites are linked to major online providers, such as AOL, that direct massive amounts of traffic to their sites.[65] Small, local Internet news sites, however, do not have the resources to forge these alliances, and are likely to fall even further behind as the number of Internet Service Providers ("ISPs") shrinks.

Furthermore, to the extent that consumers are able to find local Internet news sites, it is important to note that the vast majority of the sites are operated by existing broadcast stations or the daily local newspaper. Also, in many instances, the sites are set up not as sources of news or information, but rather as a mechanism for highlighting upcoming programming or advertising.[66] Accordingly, due to the fact the most local Internet news sites merely duplicate news and public affairs information already found in the traditional media, UCC, *et al.* believe that Internet news sources do not provide a substitute to broadcast stations or daily local newspapers.

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[64]*See* Felicity Barringer, *Growing Audience Is Turning to Established News Media Online*, N.Y. TIMES, Aug. 27, 2001, at C1 (quoting web-use measurement statistics from Jupiter Media Metrix and finding that "the beneficiaries of the growth in this online news audience continue to be the largest and best-known national news organizations").

[65]*See id.* ("After America Online and Time Warner agreed to merge last year into AOL TimeWarner, the AOL service began in March 2000 to send its users out to the CNN.com and Time.com sites, and the audience numbers for both sites quickly rose.").

[66]*See* Felicity Barringer, *Rethinking Internet News As a Business Proposition*, J. REC., Jan. 25, 2001, available at 2001 WL 4521972 (noting that the Minneapolis Star-Tribune builds and links to web sites for local businesses and noting that the Washington Post website has become "partners with online retailers in a virtual mini-mall in a corner of the washingtonpost.com website"); *see also* John Heinzl, *Bud's Latest Ad Plan*, GLOBE & MAIL, Mar. 22, 2001, at T4 (noting that the cbsmarketwatch.com website featured an advertising campaign that "features dozens of Budweiser logos as the background, or wallpaper, of certain Web pages"); Ken Kerschbaumer, *It's a Smaller World,* BROADCASTING & CABLE, Nov. 19, 2001, at 26 (noting that the ABC.com web site "remains focused on promoting ABC TV properties").

IV. Alternate Means of Promoting Diversity Have Been Largely Repealed or Are Insufficient

The Notice asks whether "there are ways that the Commission can attempt to promote viewpoint diversity beyond structural regulation?"[67] Certainly there are in theory. For example, the FCC could reinstate the Fairness Doctrine, and related rules such as the Political Editorial Rule and the Personal Attack rule. However, this seems highly unlikely.[68]

Moreover, the few remaining legal requirements mentioned in paragraph 17 of the Notice -- sections 312(a)(7) and 315 of the Communications Act of 1934, as amended, and Public, Educational and Governmental ("PEG") channel and leased access channels on cable system -- while important, are certainly not sufficient by themselves to promote adequate access for the public to competing viewpoints on important public issues. The "reasonable access" afforded by Section 312(a)(7) applies only to federal candidates – not to state or local candidate, or to ballot issues – and has been interpreted narrowly to give great discretion to licensees.[69] Section 315 affords equal opportunities only to political candidates and only when and if station chooses to

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[67]Notice at 9, ¶ 17.

[68]In the original rulemaking proceeding, opponents of the Newspaper/Broadcast Cross-Ownership Rule argued that "the Fairness Doctrine, Section 315 of the Communications Act, and the developing body of law falling under the category of 'access' to media ensure that stations will not present only one viewpoint." *Second Report and Order*, 50 FCC 2d at 1079. While the FCC correctly rejected sole reliance on these mechanisms to promote diversity, it is certainly the case that different owners make different decisions about what programming to present, what stories to cover, what views to present, and even what advertisements to carry.

[69]*See, e.g. Petition for Reconsideration by People for the American Way and Media Access Project of Declaratory Ruling Regarding Section 312(A)(7) of the Communications Act*, FCC 99-231 (rel. Sept. 7, 1999) (stating that federal candidate requests for non-standard amounts of time can be reviewed by broadcast stations on a case-by-case basis).

let a political candidate "use" the station.[70]

Furthermore, the presence of a cable system does not ensure adequate viewpoint diversity at the local level. Apart from the fact that 32.6% of households do not even subscribe to basic cable service,[71] many, if not most, cable systems do not offer PEG channels because the decision to require PEG channels is left to discretion of local franchising authorities.[72] Furthermore, even though cable systems are required to offer leased access, they have been allowed to establish rates so high that most would-speakers are unable to afford to lease time. Thus, broadcast stations and newspapers continue to be the most important "gatekeepers in the local marketplace of ideas."[73] As a result of their role as gatekeepers and the fact that most local markets have only one daily newspaper, any modification or repeal of the Newspaper/Broadcast Cross-Ownership Rule allowing the creation of daily newspaper/broadcast station combinations would significantly accelerate the already substantial reduction in diversity that has occurred in local media markets.

V. The D.C. Circuit's Decision in Time Warner Does Not Alter the Supreme Court's Decision Upholding the Constitutionality of the Newspaper/Broadcast Cross-Ownership Rule

In addition to the strong diversity and competition arguments that favor retention of the current Newspaper/Broadcast Cross-Ownership Rule, it is also important to note that the legal

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[70]*See* 47 U.S.C. §315(a); 47 C.F.R. §73.1941.

[71]*See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, at ¶19 (rel. Jan. 8, 2001) (stating that 67.4 percent of television households subscribed to basic cable service by the end of June 2000).

[72]*See* 47 U.S.C. §531 (stating that *local franchising authorities* may require cable operators to designate channel capacity for public, educational and governmental access).

[73]Notice at 9-10, ¶ 17.

rationale for the Rule continues to be supported by Supreme Court precedent. Nonetheless, the Notice notes that the D.C. Circuit recently struck down its horizontal and vertical cable ownership rules in *Time Warner Entertainment Company v. FCC,*[74] and requests comment on the relevance of the *Time Warner* decision to the Newspaper/Broadcast Cross-Ownership Rule.[75]

UCC, *et al.* believe that the *Time Warner* decision has no relevance to the Newspaper/Broadcast Cross-Ownership Rule. Following promulgation of the Newspaper/Broadcast Cross-Ownership Rule, newspaper and broadcasting trade associations challenged the rule as violating their First Amendment rights.[76] The Supreme Court rejected their claim because it "ignore[d] the fundamental proposition that there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'"[77] The Court concluded that:

> far from seeking to limit the flow of information, the Commission has acted . . . "to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech." The regulations are a reasonable means of promoting the public interest in diversified mass communications; they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them.[78]

Because the Supreme Court found the newspaper-broadcast cross-ownership rule

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[74]240 F.3d 1126 (D.C. Cir. 2001), *cert. denied,* No. 01-223 (Dec. 3, 2001).

[75]Notice at 14, ¶¶ 32-33.

[76]*FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

[77]*Id.* at 799, citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388.

[78]*Id.* at 801-02 (citation omitted).

constitutional, lower courts lack authority overturn that decision.[79] Furthermore, even if the newspaper-broadcast cross-ownership rule is modified as a result of this rulemaking to allow a greater degree of cross ownership, that should not change the Supreme Court's holding that the rule is constitutional.

Even if a modification of the Newspaper/Broadcast Cross-Ownership Rule somehow triggered a new constitutional review, the First Amendment interests at stake here are not the same as in *Time Warner* and the regulation would be subject to different level of scrutiny than the cable ownership rules. Since the *Time Warner* case involved cable, the D.C. Circuit held that it was subject to intermediate scrutiny.[80] Rules governing broadcast licensing are subject to an entirely different First Amendment analysis. As the Supreme Court recognized in *National Broadcasting Co., Inc. v. United States*, "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation. Because it cannot be used by all, some who wish to use it must be denied."[81] It follows that the denial of a license does not violate an applicant's First Amendment rights.[82] Thus, in analyzing First Amendment claims in the context of broadcasting, courts must balance the broadcasters rights against those of the public. In case

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[79] *See, e.g., Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1998).

[80] 240 F.3d at 1130.

[81] 319 U.S. 190, 226 (1943).

[82] *See id. See also Red Lion*, 395 U.S. at 388 ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."); *Turner Broadcasting Syst., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994) ("*Turner I*").

of a conflict,

> *It is the right of viewers and listeners, not the right of broadcasters, which is paramount.* It is the purpose of the First Amendment to preserved an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance the monopolization of the market, whether it be by the Government itself or a private licensee.[83]

Nor is it relevant that the D.C. Circuit held in *Time Warner* that the Commission could not rely on its diversity goal alone to support the cable ownership rule. As noted in the Notice, this holding turned on the Court's reading of specific language in the 1992 Cable Act.[84] There is no such language constraining the FCC's ability to establish policies to ensure that broadcast stations are licensed to serve the public interest.[85] Furthermore, the idea that the public interest is served by ensuring a diversity of voices is well-established and has been repeatedly upheld by the Supreme Court.

Furthermore, changes in the marketplace since the Supreme Court upheld the Newspaper/Broadcast Cross-Ownership Rule should have no effect on the First Amendment analysis. The scarcity of the broadcast spectrum underlying the *NCCB* and *Red Lion* decisions

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[83]*Red Lion*, 395 U.S. at 390 (citations omitted, emphasis added). *See also Turner I*, 512 U.S. at 663; *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 802 (1978)*("NCCB")*.

[84]*See* Notice at 14, ¶33. The pending Petition for a *Writ of Certiorari* filed by Consumer Federation of America, *et al.* argues that the D.C. Circuit has misinterpreted the language of the 1992 Cable Act in finding that the Commission lacked authority to limit ownership based on diversity concerns.

[85]The Commission's statutory authority for adopting the Newspaper/Broadcast Cross-Ownership Rule is discussed in the *Second Report and Order*. *See* 50 FCC 2d at 1048-52. Furthermore, this authority was affirmed by the Supreme Court. *See FCC v. NCCB*, 436 U.S. at 793-96.

remains today. Whether looking at the radio spectrum as a whole, or just that portion used for television broadcasting, physical limitations of the broadcast spectrum continue to exist, and far more people want to use the spectrum than can be accommodated.

The Supreme Court's observation in *Red Lion* that "[a]dvances in technology . . . have led to more efficient utilization of the frequency spectrum, but uses for the spectrum have also grown apace" remains true today.[86] With the explosive growth of cellular telephone and other wireless services, demand for spectrum is at a premium. Due to spectrum scarcity, companies are willing to pay staggering sums to obtain the right to use the spectrum.[87] In fact, one broadcaster expects to receive $1 billion as a result of a recent FCC rule permitting television broadcasters to sell spectrum space, originally given to them for free, which would otherwise have to be returned to the government in a few years.[88] The FCC decided to allow this sale and forgo the funds that would have been received from an auction to make room for Third Generation broadband services on an already over-crowded spectrum.[89] The high prices commanded in auctions reflects the continued scarcity of the spectrum.

The volume of license applications before the FCC provides further evidence of the continuing scarcity of the broadcast spectrum. In 2000, for example, the FCC received over 1200

[86]395 U.S. at 396-97.

[87]*See, e.g.*, *Statement of FCC Chairman Michael Powell on Signing of Nextwave Settlement Agreement* (rel. Nov. 27, 2001) (noting that the spectrum originally licensed to Nextwave has been re-auctioned for $16 million).

[88]*See Payday for Paxson*, BROADCASTING & CABLE, Sept. 24, 2001, at 33.

[89]*See id.; see also Service Rules for the 746-764 and 776-794 MHZ Bands, and Revisions to Part 27 of the Commission's Rules*, WT Docket No. 99-168, at ¶¶2-3, 11 (rel. Sept. 17, 2001).

applications for low-power broadcast stations even though only "a tiny fraction" of those applicants would receive licenses.[90] In addition, the FCC has a large number of pending, mutually-exclusive applications for both commercial and noncommercial radio and television licenses.[91]

Moreover, since its 1978 decision in *NCCB*, the Supreme Court has on numerous occasions reaffirmed that relaxed scrutiny under the First Amendment remains appropriate for the broadcast media. In *Turner I*, for example, the Supreme Court noted that "[a]lthough courts and commentators have criticized the scarcity rationale . . . we have declined to question its continuing validity as support for our broadcast jurisprudence, and see no reason to do so here."[92] Even more recently, in *Reno v. American Civil Liberties Union*, the Supreme Court acknowledged that there are "special justifications for regulation of the broadcast media," but found that unlike the broadcast spectrum, the Internet could not be considered scarce.[93] Similarly, the D.C. Circuit has applied "a less rigorous standard of First Amendment scrutiny"

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[90] *See* Stephen Labaton, *Congress Severely Curtails Plan for Low-Power Radio Stations*, New York Times, December 19, 2000, A-1. The lack of available spectrum is also one reason for the large number of unlicensed microbroadcasters, or "pirate" radio operators, that the FCC has shut down in recent years. *See e.g.*, *United States v. Szoka*, 260 F.3d 516, 526 (6th Cir. 2001); *United States v. Any and All Radio Station Equipment*, 93 F. Supp. 2d 414, 417, 420-21 (S.D.N.Y. 2000).

[91] *See, e.g.*, Public Notice, DA 0-1-2242, *Window Opened to Permit Settlements for Closed Groups of Mutually Exclusive Broadcast Applications*, Sept. 27, 2001 (attaching list of 186 pending applications for 31 non-reserved FM licenses and 13 pending applications for three non-reserved television licenses).

[92] *Turner I*, 512 U.S. at 638 (citation omitted).

[93] 521 U.S. 844, 868, 870 (1997). *See also Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 227-228 (1997)("*Turner II*") (Breyer, J. concurring); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 740-41 (1996) (plurality opinion); *Metro Broadcasting Co. v. FCC*, 497 U.S. 547, 566-67 (1990), *overruled in part by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *id.*, 497 U.S. at 615 (O'Connor, J., dissenting).

and taken the public's First Amendment rights into account when reviewing broadcast regulations.[94]

Finally, Congress has recognized and, in some cases, perpetuated the continuing scarcity of television licenses. For example, Section 204(a) of the1996 Act specifically reenacted the spectrum-scarcity-grounded public interest standard as the basis on which broadcast license renewals are to be granted.[95] In another section of the 1996 Act, Congress also provided for a transition to digital television technology, but directed that the FCC should limit the initial eligibility for such licenses to" incumbent television licensees."[96]

In sum, the recent decision by the D.C. Circuit finding the FCC's cable ownership rules unconstitutional has no relevance to this proceeding. The Supreme Court has already found the newspaper-broadcast rule constitutional, and only the Supreme Court has the authority to alter that conclusion. Furthermore, the D.C. Circuit decision concerned cable, not broadcasting, which is subject to a different First Amendment analysis and was premised on particular statutory language applicable only to cable. Because it is still the case that everyone who seeks a broadcast license cannot obtain one, it serves the public interest, and does not violate the First Amendment rights of newspaper owners, to limit broadcast licenses to those that do not own a

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[94]*See Time Warner*, 93 F.3d at 975 (quoting *Turner I*, 512 U.S. at 637) (finding regulation requiring direct broadcast satellites to reserve channel capacity for noncommercial educational and informational programming constitutional), *reh'g en banc denied*, 105 F.3d 723 (1997).

[95]47 U.S.C. §204(a). Earlier, in the Children's Television Act of 1990, Pub. L. No. 101-437, § 102, 104 Stat. 996 (1990) *codified at* 47 U.S.C. § 303a (1991), Congress invoked spectrum scarcity to impose stringent new mandates for programming directed to children and restrict commercialization during such programming. *See* H.R. Rep. No. 101-385, at 6-7 (1990).

[96]See 47 U.S.C. §201(a)(1).

daily newspaper in the same community.

CONCLUSION

As detailed above, the recent wave of consolidation in the broadcast industry has led to a massive reduction in the number of independent owners of local broadcast stations. This, in turn, has led to a large decrease in diversity and competition in most local media markets across the country. This reduction is diversity and competition will be exacerbated and extended if the Newspaper/Broadcast Cross-Ownership Rule is modified or repealed. Accordingly, UCC, *et al.* urge the Commission to retain the current Newspaper/Broadcast Cross-Ownership Rule.

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Attachments